Supreme Court, U.S.
FILED
NOV 30 1999
CLERK

No. 99-466

In The

Supreme Court of the United States

CITY OF LOS ANGELES, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF OF THE PETITIONERS

1. Commendably, the Government's Brief in Opposition ("Govt. Opp.") does not contest that this case properly presents for review the question whether the decision below is at odds with the requirement of *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981), that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." The Government also does not dispute that this case properly presents the question whether the proper standard of judicial review of an agency's interpretation of a grant condition is one derived from *Pennhurst* or one derived from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Government could hardly take a different position since the court of appeals' opinion in *LAX II* expressly addressed both the issue of whether DOT's reliance on two grant assurances to deprive the City of the ability to recover the fair market value ("FMV") of airfield land "conflicts with the 'clear statement' requirement of *Pennhurst*," Pet. App. at 13a, and whether the court was "obliged to defer to a reasonable judgment by an agency acting pursuant to congressionally delegated authority," Pet. App. at 11a; *see also* Pet. App. at 110a-111a (Silberman, J., concurring in denial of rehearing *en banc*).[1]

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[1] By contrast, respondent Air Transport Association of America ("ATA") has chosen not to be as forthright with the Court.

First, ATA asserts that "even if this case involved a question regarding the proper standard for reviewing agency interpretation of grant agreements . . . the issue has been waived." ATA Opp. at 13. That assertion is demonstrably false, as the opinions in the court of appeals make clear.

Instead, the Government states that "[n]othing in the decision in *Pennhurst* suggests . . . that when it is clear that Congress intends to impose obligations on local governments receiving federal funds, the scope of those obligations should be determined by anything other than normal rules of statutory construction, including principles of deference set forth in *Chevron*. . . ." Govt. Opp. at 7-8. The Government's arguments, however, are either immaterial, squarely contrary to the holding in *Pennhurst* and its progeny, or contrary to the decision and supporting record that the Government wishes to uphold.

Second, in an attempt to paint the City as two-faced, ATA distorts the City's position in *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994) ("*Kent County*"). Contrary to ATA's assertion, ATA Opp. at 10-12, the City has not changed its position on whether deference should be given to DOT. The question of what deference the courts should give to an interpretation by DOT of grant conditions imposed by the AAIA was not presented in *Kent County*, and accordingly the City took no position on that issue then. *See Kent County*, 510 U.S. at 361, 372 (petitioners did not seek review of the Sixth Circuit holding that the AAIA does not confer a private right of action on air carriers; thus, questions concerning the AAIA were not properly before the Court).

The City believes it is unwise (and unnecessary) to use its limited space in this paper to respond to most of the other arguments raised solely by ATA, especially ATA's allegations concerning revenue diversion. *See* ATA Opp. at 3-5, 19, 21. The irrelevance of these allegations is demonstrated by the fact that, although ATA has continuously trotted out this argument, neither DOT nor the court of appeals has ever accepted it in any of the proceedings below.

The Government's contention that *Chevron* deference to DOT's resolution of airport fee disputes was commanded by this Court's decision in *Kent County* is misplaced. *Kent County* was a case brought by air carriers in district court under the Anti-Head Tax Act ("AHTA"), 49 U.S.C. app. § 1513 (recodified at 49 U.S.C. § 40116). Airport Improvement Project ("AIP") grant assurances required by the Airport and Airways Improvement Act ("AAIA"), 49 U.S.C. § 47101 *et seq.* (formerly codified at 49 U.S.C. app. § 2201 *et seq.*), were not at issue in the case. *See* 510 U.S. at 361, 372. Statutory AIP grant assurances were not used, as they were in this case, as the basis for a DOT determination as to the reasonableness of an airport's rates. Thus, this Court had no occasion to consider the interplay between the federalism concerns underlying the "clear statement" requirement of *Pennhurst* and the "normal rules of statutory construction," including *Chevron* deference.

The Government never justifies its assertion that "petitioners err in contending . . . that the court of appeals' decision conflicts with *Virginia Department of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997) (*en banc*), and *Doe v. Oak Park & River Forest High School District*, 115 F.3d 1273 (7th Cir.), *cert. denied*, 118 S. Ct. 564 (1997)." Govt. Opp. at 8 n.4. Indeed, the Government appears to argue that these cases are different because they "address the obligations of state and local governments under the Individuals with Disabilities Education Act," while the present case involves a "determination under the [Federal Aviation Administration Authorization Act of 1994]." *Id.* at 8, 9 n.4. *Pennhurst*, however, is not limited to cases

arising in connection with education grants.[2] As the Fourth Circuit in *Riley* and the Seventh Circuit in *Oak Park* recognized, the principle at stake in these cases is "the permissible reach of federal power under the Spending Clause." *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 570 (4th Cir. 1997) (*en banc*); *see also Doe v. Oak Park & River Forest High Sch. Dist.*, 115 F.3d 1273, 1278 (7th Cir.) (adopting reasoning in *Riley*), *cert. denied*, 118 S. Ct. 546 (1997). More specifically, the question is whether, after accepting federal funds, states and localities can be bound by later agency-created conditions of which they had no clear notice. That principle is as applicable to the AIP grants involved in this case as it was to the education grants involved in *Riley* and *Oak Park*.

The Government places primary reliance on the contention, derived from the *LAX II* opinion, that DOT's decision that the City has no opportunity costs in its airfield land was merely "*a consequence* of an unambiguously imposed condition – that the airport would be kept open for public use," Pet. App. at 13a (emphasis in original), and, thus, did not add any new condition to the federal grant. This contention, however, essentially concedes that the City was *not* unambiguously informed at

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[2] *See, e.g., Suter v. Artist M.*, 503 U.S. 347, 356 (1992) (applying *Pennhurst*, held States receiving funds under Adoption and Assistance Act of 1980 were not given unambiguous notice that the Act could be enforced by private individuals or that the Act created a private right of action); *South Dakota v. Dole*, 483 U.S. 203, 207-208 (1987) (upholding as consistent with *Pennhurst* a clearly stated condition withholding a portion of a State's federal highway funds if it did not adopt a 21-year-old drinking age).

the time it took AIP grants that they prohibited the use of FMV to value airfield land. If an agency or reviewing court is permitted to rely upon unstated, alleged "consequences" of grant conditions – rather than their plain language – the "clear statement" requirement of *Pennhurst* would be rendered a dead letter. It would be the rare instance that an agency would not be able to tease from one grant condition or another a "consequence" that would be capable of imposing a new, unanticipated restriction on federal grant recipients not specifically set forth in the grant conditions themselves.

This conclusion is well-illustrated by the record in this case. Although the *LAX II* opinion states that DOT's prohibition on use of FMV to value airfield land was a consequence of grant conditions, DOT had not conjured up that "consequence" prior to its December 23, 1997 Remand Decision, even though administrative proceedings had been ongoing since October 21, 1994. Pet. App. at 84a. During that three-year period, the air carriers filed a complaint and an amended complaint, there were two full adjudicatory hearings, two ALJ recommended decisions, two final DOT decisions, thousands of pages of testimony and briefing by the parties and two court of appeals opinions – *LAX I* and the *Policy Appeal*. At no time during that entire period did DOT ever state that LAX could not use FMV to value airfield land as a "consequence" of its grant conditions. This supposed consequence of the City's grant assurances was only invented by DOT after its initial decision was set aside in *LAX I*. This is surely a harbinger of what administrative agencies will be inclined to do in the future if they are permitted to swap "consequences" as sanctioned by *LAX II* for the

"clear and unambiguous" grant conditions required by *Pennhurst*.

2. The essence of the decision in *Kent County* is that in setting reasonable compensatory rates and charges, airport owners are not required, as the air carriers had urged, to recognize the "interdependency" of aeronautical and non-aeronautical activities, and thus are not required to offset aeronautical costs with non-aeronautical benefits. *Northwest Airlines, Inc. v. County of Kent, Mich.*, 738 F. Supp. 1112, 1114 (W.D. Mich. 1990), *aff'd in part, rev'd in part*, 955 F.2d 1054, 1057 (6th Cir. 1992), *aff'd*, 510 U.S. 355 (1994). Instead, the reasonableness of compensatory aeronautical rates is to be determined without considering the costs or benefits of non-aeronautical activities. This approach was later expressly endorsed by Congress in 49 U.S.C. § 47129(a)(2) (specifically authorizing compensatory rate-setting) after the air carriers sought unsuccessfully to reverse *Kent County* through legislation.

DOT and the court of appeals in *LAX II* nevertheless held that, even if the City's grant assurances did not bar the City from recovering the opportunity costs of devoting its land to airfield use, it would be unreasonable to allow opportunity cost recovery because of the non-aeronautical benefits generated by the airport. Pet. App. 13a-15a. In *Kent County*, however, this Court rejected the air carriers' claim that such non-aeronautical benefits should be taken into account in determining the reasonableness of aeronautical charges. *See* 510 U.S at 369-70. The flaw in the logic of the reasoning of DOT and the court of appeals can easily be revealed. If in the future LAX begins to lose money or to cause environmental

harm to the community, the air carriers and DOT would surely resist any effort by the City to increase its landing fees to compensate for those loses or for off-airport impacts. They would no doubt claim that the City bore those risks when it chose to use compensatory rates and could not reasonably include non-airfield losses in its landing fee because to do so would violate the principle of independence that defines the compensatory method approved by this Court in *Kent County* and codified by Congress in 49 U.S.C. § 47129(a)(2). The same principle, however, bars DOT from relying on non-airfield revenues or benefits to justify its decision prohibiting the City from recovering the FMV of airfield land in its landing fees today.

3. If the court of appeals' decision is permitted to stand, the federal government's power to regulate state and local governments pursuant to Congress's Spending Clause would be expanded dramatically by permitting administrative agencies to infuse grant conditions with unanticipated "consequences" by relying on *Chevron* and disregarding *Pennhurst*. Perhaps for this reason, the Government does not question the national importance of the issues presented by the petitions for certiorari. ATA, on the other hand, inexplicably belittles this as a case involving "an isolated, unrepeated dispute between a single airport and the airlines serving it." ATA Opp. at 21.[3]

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[3] For purposes of its opposition, ATA falsely portrays this question as unlikely to arise anywhere but in Los Angeles. ATA Opp. at 20-21. In fact, this precise issue is likely to arise at many airports throughout the Nation in the future. Like many airport owners, at the advent of the jet age the City entered into long-term "residual" rate-setting agreements with the air carriers.

However, when the very same air carriers (represented by the very same lawyers) successfully sought a writ of certiorari in *Kent County*, they took the exact opposite position. In *Kent County*, they argued that this Court should grant certiorari because of the national importance of the economic relationships between local airport owners and commercial air carriers and because of the significance of the rules that would be established for all airports by the resolution of a single dispute involving a small, regional airport in Grand Rapids, Michigan. They stressed that the Court's decision would "necessarily affect 'airports across the country.'" Petition for Certiorari in No. 92-97 at 20 (quoting *Northwest Airlines, Inc. v. County of Kent, Mich.*, 955 F.2d 1054, 1066 (6th Cir. 1992) (Merritt, C.J., dissenting from denial of rehearing *en banc*).[4]

After these agreements expired in 1992, the City exercised its legal right to switch to a compensatory rate-setting methodology. Similar agreements have begun to expire at many other airports as well. As they do, airport operators will be able to employ compensatory rate-setting methods – and will be free to seek to impose FMV charges for a wide variety of facilities that the air carriers are currently using at far less than their economic cost. Thus, whether it is reasonable for airports to use FMV to value facilities is of critical importance for the Nation's airport owners and operators. It is for this reason that the national association of commercial airport owners and operators, Airports Council International-North America, has filed its own petition for certiorari in order to protect the rights of its members.

[4] In their petition for a writ of certiorari in *Kent County*, the airlines took pains to underscore the likelihood that the Court's decision would affect "numerous other airports" and noted that at the time this Court granted certiorari in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), "only five or six jurisdictions" were imposing

Stronger considerations than those advanced by the air carriers in *Kent County* warrant certiorari in this case.

CONCLUSION

For all of the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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airport "head taxes," but in the year following the Court's decision in *Evansville*, "44 jurisdictions had adopted the tax." Petition for Certiorari in No. 92-97 at 20-21 & n.13.

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